IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-480
[2019] NZHC 1133

	BETWEEN	STAN SEMENOFF LOGGING LIMITED Applicant
	AND	NEW ZEALAND TRANSPORT AGENCY Respondent

Hearing: 20 May 2019

Counsel: D J Neutze and S Corlett for Applicant
P F Wicks QC and R McCoubrey for Respondent

Judgment: 23 May 2019

JUDGMENT OF WHATA J

This judgment was delivered by me on 23 May 2019 at 10.30 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……

Solicitors: Brookfields, Auckland
Meredith Connell, Auckland

[1] Stan Semenoff Logging Limited (SSL) is a trucking company. On 15 March 2019, the New Zealand Transport Agency (NZTA) gave notice of its decision to revoke SSL's transport (goods) service licence (TSL) because it found that the "Persons in Control" of the trucking operations are not fit and proper having regard to public safety. SSL disputes this. It claims the NZTA did not have a proper basis in law or fact for this conclusion. SSL appealed the decision to the District Court and commenced related judicial review proceedings in this Court.

[2] On 22 March 2019 Woolford J granted an urgent interim order preserving SSL's position, subject to conditions, until further order of the Court. This judgment examines whether that interim order should be maintained pending the substantive hearing on the judicial review claim.

Background

[3] SSL is the largest logging haulage company in Northland and is responsible for 50 per cent of Northland's wood flow and log haulage. SSL's business involves the transportation of logging material from the forest to a port in Northland. It employs approximately 55 people, of whom 48 are logging truck drivers. It maintains a fleet of 55 vehicles and has contracts with over 25 companies, including suppliers and logging operators throughout Northland.

[4] Over the period July 2016 to March 2019 the NZTA engaged in an ongoing audit of SSL's operations. This involved two separate audits in 2016 and 2017 of SSL's operations. The audits included an examination of logbooks, GPS records and timesheets. SSL responded by offering up action plans which included measures such as checking all log books between specified periods and other random checks. The effectiveness of the action plans appeared to be confirmed by NZTA's Operating Rating System (ORS) rating of SSL, issued on 26 July 2018. SSL received a four (out of five) star rating and a "good level of compliance".

[5] The NZTA had a different impression of SSL's performance. On 1 August 2018 the NZTA briefed the Cabinet Ministers on the Agency's intention to revoke SSL's TSL. This was followed by the publication to SSL of the 2017 audit report on 8 August 2018. The report noted, among other things:

(a) The traffic offence history of SSL comprising 116 traffic offences in the period 1 July 2015 to 18 July 2018;

(b) 158 alleged log book infringements by drivers NZTA discovered as part of the analysis of the eight driver's log books, GPS records and time sheets in the 2017 audit.

(c) "A large number" of speeding compliance incidents identified by SSL's operator rating system (ORS) score, traffic offence reports, speed camera reports and GPS data;

(d) High percentages of vehicles failing to comply with certificate of compliance requirements, especially in relation to brake systems;

(e) In the period 1 July 2015 to 30 June 2017 142 (of 472 vehicles) failed roadside inspections and 73 police infringements were incurred.

(f) A recommendation that the audit report be referred to the appropriate manager within the NZTA.

[6] On the following day, NZTA served on SSL a notice of its proposal to revoke SSL's licence. NZTA proposed to revoke SSL's licence on the basis that the two directors of SSL, Stan Semenoff and his son, Alexander Semenoff, together with the general manager of SSL, Daron Turner, were not fit and proper persons to have control of the transport service. The reasons for the proposal to revoke were listed as follows:

> 8 (a) An audit in 2016 (2016 Audit) identified a number of areas of concern in relation to the transport service it was carrying out. These included:
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> (i) Non-compliance within the Company with work time rules. The 2016 Audit identified a number of drivers who were exceeding five and a half hours of work without having a 30-minute break. In addition, the 2016 Audit identified a number of drivers who were exceeding 13 hours of work time in a cumulative work day.
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> (ii) Non-compliance within the Company with logbook requirements which included the entry of fabricated and/or incorrect information in relation to drivers' rest times. Other issues identified included drivers failing to record days off,

failing to ensure logbook information was clear and legible and failing to record locations in their logbooks.

(iii) A failure to adequately monitor the drivers' speeds, as GPS data showed that drivers were exceeding the speed limits.

(b) A number of the issues outlined at 8(a) above were shown to be continuing in the fleet when the Agency conducted a follow-up visit to the Company on 10 November 2016, the results of which were provided to Mr Turner on 10 November 2016. Specifically:

(i) Drivers were still failing to comply with work time and rest time rules and it was evident that the Agency's expected outcomes previously identified had still not been met.

(c) A number of the issues outlined at paragraph 8(a) above were again shown to be continuing in the audit in 2017 (2017 Audit). Specifically:

(i) It was evident that the Agency's expected outcomes previously identified still had not been met.

(ii) It was evident that the Company was not taking a proactive approach to monitor the drivers' work times to ensure compliance with the work time rules. A sample of logbook pages, timesheets and GPS data from eight drivers was analysed and all of those drivers had failed to comply with work time rules.

(iii) It was evident that the Company was not taking a proactive approach to monitor the drivers' logbooks to ensure compliance with logbook rules. A sample of logbook pages from eight drivers was analysed. All eight drivers had failed to comply with logbook rules.

(iv) Drivers were continuing to exceed the speed limit.

(d) The Company has accumulated numerous traffic charges in the period from 1 July 2015 until 18 July 2018, including for exceeding the maximum gross weight limit on numerous occasions and for vehicles not being up to Certificate of Fitness standard.

(e) Failures in the way in which a company functions are relevant to the fit and proper person assessment of those in control.

[7] SSL was invited to make submissions by 5pm 30 August 2018.

[8] On 23 August SSL, through its lawyers, sought information in relation to the audits. It received an initial response on 30 August 2018 and a substantive response on 5 September 2018. SSL then made its submissions on 14 September 2018. SSL identified that:

(a) the ORS run by NZTA provided an accurate assessment of an operator's risk to road safety, with SSL's ORS scores demonstrating that it had continually improved since the 2016 audit and was currently considered to have a "good level of compliance";

(b) speeding had been addressed by the installation of equipment preventing acceleration beyond 90 kilometres an hour on 95 per cent of its fleet, and by emphasising the importance of not speeding at health and safety meetings and in SSL's text message distribution system; and

(c) there was a commitment to health and safety by the Persons in Control (evidenced by records of awards in this regard) and a reputation as highly respected people within the health and safety space and logging industry.

[9] NZTA was not content with SSL's explanations. NZTA wrote to SSL referring to an "alternative analysis" of GPS data reviewed as part of the 2017 audit. The alternative analysis identified periods where vehicles were stationary in the forest and opined that as drivers were required to comply with the Approved Code of Practice for Safety and Health in Forest Operations (the Code), those stationary periods could not amount to rest time.

[10] SSL refuted NZTA's points noting:

(a) the Code was considered best practice, though not mandatory and did not contain any actions haulage drivers were required to take in the forest. Therefore, NZTA's conclusion, in the alternative analysis, that drivers could not be taking rest times was incorrect; and

(b) of the eight drivers whose log books were analysed by NZTA in the 2017 audit and in the alternative analysis, seven of them no longer worked for SSL.

[11] NZTA remained unconvinced and on 15 March 2019, it gave notice of its decision to revoke SSL's licence with effect from midnight on 22 March 2019. The reasons for the decision made by Ms Debra Despard are recorded as follows:

> (a) There remains an absence of reliable systems or processes within [SSL] to ensure that its drivers are complying with the Act and the Rules. This is despite issues with driver non-compliance, and the need for systems or processes to be put in place and properly monitored, being raised with the Persons in Charge on multiple occasions (s 30C(2)(f)).
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> (b) There are pervasive logbook issues among the drivers of [SLL] evidencing, at the very least, false logbook entries that are not being addressed by [SSL] and, at worst evidence showing that a failure to take proper breaks, working over the maximum number of hours and failure to complete the logbooks as required is commonplace within the company and undisciplined by its management. The lack of systems and processes in place (as identified at (a)) means that these issues are not being picked up and addressed by [SSL] itself (s 30C(2)(f)). Indeed, it appears that the attitude to rest time is driven by the Company itself.
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> (c) In addition, [SSL] has an extensive transport-related offending history (s 30C(2)(b), LTA). Speeding by its drivers appears to be tolerated.
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> (d) Rather than address the issues identified by the Agency [SSL] has either stated that it will make improvements, which have not then been made – certainly not on a consistent basis – or it has sought to argue either that its drivers are not breaching the Act or Rules, or that their breaches should be overlooked for practical reasons. I consider there is clear evidence that drivers for [SSL] have been breaching the Act and the Rules, and that [SSL], a large company that has operated under the Licence since 24 January 2014 and should be well aware of the provisions contained in the LTA and the Rules, has failed to address these issues (s 30C(2)(f)).

[12] The Revocation Decision also noted that while NZTA considered SSL's good ORS rating, it is a "limited tool" which does not include all offences in creating a rating. This view marries with the NZTA notification to operators in December 2018 that it intended to review the ORS. NZTA also did not consider it relevant that SSL no longer employed seven of the eight drivers from the 2017 audit.

SSL's allegations

[13] SSL claims:

(a) The Revocation Decision was based on an error of law in concluding that the Licence was to be revoked on the basis that Persons in Control of SSL were not fit and proper persons and in particular:

(i) NZTA has explicitly acknowledged that there are no transport related offences, serious behavioural problems or criminal histories of the Persons in Control (Alexander Semenoff, Stan Semenoff and Daron Turner) that were of concern to NZTA.

(ii) None of the matters referred to in s 30C(2)(a) apply to any of the Persons in Control.

(iii) For a matter under s 30C(2)(f) to be taken into account, it must relate or be specifically linked to the person who is said to be unfit; general alleged failings of a corporate entity in which the person is involved cannot be assumed to make a person in control unfit for the purposes of s 30C(2).

(iv) All concerns NZTA has about SSL relate to alleged general failings of SSL, or its employees, without any or sufficient evidence to establish that any of the individual Persons in Control was responsible for or directly involved in all or any of the alleged failings.

(v) There was no evidence available to NZTA to conclude that any of the Persons in Control was not a fit and proper person in terms of s 30C.

(b) In making the Revocation Decision, NZTA had failed to take into account relevant considerations, namely:

(i) NZTA failed to take into account the fact that seven of the eight drivers from the 2017 Audit no longer work for SSL, stating that this information was not relevant, when that must be relevant to

whether SSL presents an ongoing significant risk to public safety.

(ii) NZTA failed to take into account the continued attention of SSL to speeding by use of the text message distribution system and the installation of equipment to limit speed on vehicles, where such factors were plainly relevant to whether SSL presented a significant risk to public safety.

(iii) NZTA wrongly dismissed its own ORS rating as a limited tool, when it provided a reliable guide of SSL's safety risk bearing in mind the number of vehicles in its fleet and the kilometres travelled.

(iv) NZTA failed to take into account the fact that there is no evidence that fatigue has ever been an issue in an incident involving an SSL driver.

(c) In making the Revocation Decision, NZTA took into account irrelevant considerations, namely:

(i) NZTA, in determining that rest time and logbook compliance was of concern to it, relied on the Code, which is a best practice guide only for forestry operators and is irrelevant to whether Persons in Control are fit and proper; and

(ii) in determining that the Persons in Control were not fit and proper persons, NZTA relied on general alleged failures of SSL as a corporate entity, without considering whether each of the individual Persons in Control was in fact responsible for SSL's alleged failures. NZTA's finding that the Persons in Control are not fit and proper persons is a decision that no reasonable decision-maker could have reached given the evidence before it.

[14] NZTA denies each of these claims.

Threshold

[15] As SSL stated, s15 of the Judicial Review Procedure Act 2016 (JRP Act) allows the Court to make interim orders of the kind sought by SSL if, in the Court's opinion, "it is necessary to do so to preserve the position of the applicant".[1] Interim orders include a declaration that any licence that has been revoked continues and, where necessary, it is deemed to have always continued.[2] An order under this section may be made subject to such terms and conditions as the Court thinks fit, and be expressed to continue in force until the application is finally determined.[3]

[16] If I am satisfied orders are necessary to preserve SSL's position, then I must consider whether relief should be granted.[4] The only issue in dispute is whether public road safety considerations make it necessary to refuse relief. The closure of SSL, loss of jobs and livelihoods and likely business interruption are otherwise compelling reasons to grant interim orders.

The issues

[17] Mr Neutze focused the applicants' case for interim relief on their primary complaint, namely that the NZTA did not properly direct itself to the threshold requirements for finding each of the "Persons in Control" were not fit and proper persons. As foreshadowed, it is also common ground that but for public safety concerns, if SSL has an arguable case, ongoing interim orders preserving SSL's position should be made.

[18] There are therefore two key issues to resolve:

(a) Whether SSL has an arguable case that the NZTA erred in law in finding that the "Persons in Control" are not fit and proper persons.

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1 Section 15(1) of the JRP Act.
2 Section 15(2)(c) of the JRP Act.
3 Section 15(4) of the JRP Act.
4 *Foreman Automotive Ltd v New Zealand Transport Agency* [2013] NZHC 1167 at [25].

(b) Whether interim orders should be declined on public safety grounds.

Scope of judicial review

[19] As will shortly be explained, the central requirement of law that will be under scrutiny in this case at the substantive review hearing is the requirement to be "satisfied" that the "Persons in Control" of SSL were not "fit and proper person(s)". This requirement to be satisfied also requires regard to specified matters. Given the terminal effect of a negative finding for SSL, it is the responsibility of this Court on review to ensure that this legislative condition is fulfilled. As the Supreme Court said in *McGrath*, that is an assessment of substance and requires an assessment of the objective reasonableness of that finding.[5] As I am engaged in an assessment for the purposes of interim relief only, I need only be satisfied that there is a reasonably arguable case that this legislative condition was not fulfilled.

Legal framework

[20] The purpose of the LTA is to promote safe road user behaviour and vehicle safety; to provide for a system of rules governing road user behaviour, the licensing of drivers and technical aspects of land transport; to recognise reciprocal obligations of persons involved; to consolidate and amend various enactments relating to road safety and land transport; and to enable New Zealand to implement international agreements relating to road safety and land transport.[6]

[21] To obtain a TSL, a person must make an application in accordance with the regulations and rules and accompanied by the fee (if any) required by the regulations.[7] After receiving the application, the Agency will grant it only if they are satisfied that:[8]

(a) the applicant is a fit and proper person to hold a TSL;

(b) any person who is to have, or is likely to have, control of the transport service is a fit and proper person to have such control; and

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5 *McGrath v Accident Compensation Corporation* [2011] NZSC 77 at [31].
6 "Our Legal Framework" NZ Transport Agency <www.nzta.govt.nz>.
7 Land Transport Act 1998, s 30K.
8 Land Transport Act 1998, s 30L.

(c) any representative meeting the requirements of subsection (1A)(b) is a fit and proper person to be a representative; and

(d) the applicant or any person who is to have control of the transport service is the holder of the appropriate certificate (if any) required by the regulations or the rules; and

(e) all relevant requirements of this Act, the regulations, and the rules have been complied with.

[22] The LTA provides a detailed scheme of rules and regulations directed to achieving the Act's purpose. These include the Land Transport Rule: Work Time Logbooks 2007 rules (Rules) which place restrictions on how long drivers of commercial or heavy motor operators may work.

[23] In addition to setting out offences for drivers who do not comply with the LTA and the Rules, Part 6C sets out offences relating to the chain of responsibility. Relevantly, s 79T provides that every person commits an offence where the person, by act or omission, directly or indirectly causes or requires a driver to fail to comply with the rest time requirements prescribed in the Act or the rules if that person knew or should have known that the rest time requirements would not be or would likely not be, complied with.

[24] The LTA then lays out a careful scheme for the removal of TSLs for non-compliance with, among other things, the Rules. Section 30C states:

30C General safety criteria

(1) When assessing whether or not a person is a fit and proper person in relation to any transport service, the Agency must consider, in particular, any matter that the Agency considers should be taken into account—

(a) in the interests of public safety; or

(b) to ensure that the public is protected from serious or organised criminal activity.

(2) For the purpose of determining whether or not a person is a fit and proper person for any of the purposes of this Part, the Agency may

consider, and may give any relative weight that the Agency thinks fit having regard to the degree and nature of the person's involvement in any transport service, to the following matters:

(a) the person's criminal history (if any):

(b) any offending by the person in respect of transport-related offences (including any infringement offences):

(c) any history of serious behavioural problems:

(d) any complaints made in relation to any transport service provided or operated by the person or in which the person is involved, particularly complaints made by users of the service:

(e) any history of persistent failure to pay fines incurred by the person in respect of transport-related offences:

(f) any other matter that the Agency considers it is appropriate in the public interest to take into account.

(3) In determining whether or not a person is a fit and proper person for any of the purposes of this Part, the Agency may consider—

(a) any conviction for an offence, whether or not—

(i) the conviction was in a New Zealand court; or

(ii) the offence was committed before the commencement of this Part or corresponding former enactment; or

(iii) the person incurred demerit points under this Act or a corresponding former enactment in respect of the conviction; and

(b) the fact that the person has been charged with any offence that is of such a nature that the public interest would seem to require that a person convicted of committing such an offence not be considered to be fit and proper for the purposes of this section.

(4) Despite subsection (3), the Agency may take into account any other matters and evidence as the Agency considers relevant.

[25] Control is defined in s 2 of the LTA as follows:

control, in relation to a transport service, means direct or indirect control of the management of the whole or part of the transport service by a shareholding or the holding of any position (however described) in the management of the whole or part of the transport service that gives the person a significant influence on the operation of the whole or part of the service (whether or not other persons are also involved)

[26] The power to remove a TSL is then conferred by s 30S as follows:

> **30S When Agency may revoke transport service licence**
>
> (1) The Agency may revoke a transport service licence if the Agency is satisfied that—
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> (a) the holder of the transport service licence is not a fit and proper person to be the holder of a transport service licence; or
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> (b) any person who has control of the transport service is not a fit and proper person to have control of the service; or
>
> (c) any representative who lives in New Zealand is not a fit and proper person to be a representative; or
>
> (d) any driver is not a fit and proper person.
>
> (2) (1A) Subsection (1)(c) does not apply in relation to drivers who are facilitated to connect with passengers under a facilitated cost-sharing arrangement.
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> (3) Subpart 5 applies to a decision to revoke a transport service licence.

[27] Subpart 5 deals with the process of making adverse findings about, among other things, persons in control. The NZTA must notify a proposal to make an adverse finding to the person directly affected. A copy of this notice must be provided to any person on the basis of whose character the adverse finding arises if that person is not the person directly affected.[9] The notice must include the grounds of the proposed decision and specify a date for submissions, the date any decision is likely to take effect and that person's right of appeal.[10] The person notified is then responsible for ensuring that all information that the person wishes to have considered by the NZTA is provided within the time specified in the notice and the NZTA must consider any submissions made by that person.[11]

[28] The NZTA must determine whether to make the proposed adverse decision and as soon as practicable thereafter, notify the person directly affected and any other

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9 Section 30W(2).
10 Section 30W(1).
11 Section 30X.

person whose character is subject to the adverse finding, of its decision and the right of appeal.[12]

[29] The right of appeal to the District Court is conferred by s 106. Reflecting the public interest significance of adverse decisions, s 106(3) of the LTA provides that:

> Every decision of the Agency appealed against under this section continues in force pending the determination of the appeal, and no person is excused from complying with any of the provisions of this Act on the ground that any appeal is pending.

An arguable case?

[30] Mr Neutze made the following key points:

(a) The decision to revoke was based on s 30S(1)(b) which requires a finding that a person in control is not fit and proper, having regard to the matters listed in s30C.

(b) The decision maker could not base the decision to revoke on any of the matters listed at s 30(C)(2)(a)-(e) or (3) dealing with personal offending or personal non-compliance.

(c) The decision maker must have relied on s 30C(2)(f), that is the power to consider "any other matter the Agency considers it is appropriate to take into account".

(d) The NZTA was wrong to rely on s 30C(2)(f) in this way because "any other matter" must still demonstrably relate to personal actions that bear on that person's fitness.

(e) Even if the NZTA could rely on matters that are not personal to the affected person's fitness, it was not sufficient to simply refer, as the decision maker did, to SSL's record of non-compliance unless it could be shown that the non-compliance was related to that person.

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12 Section 30Y.

(f) While the decision maker attributed SSL's alleged non-compliances to Messrs Semenoff and Mr Turner, there was no clear evidence cited by the decision maker directly linking any of them to those alleged non-compliances in terms of active encouragement or in terms of tolerating non-compliance.

(g) Moreover, the decision maker appears to have wrongly assumed that it was not necessary for her to be satisfied about the fitness of each person in control and rather simply assumed that evidence of SSL's non-compliance and allegedly poor performance was sufficient.

(h) It must therefore be seriously arguable the decision maker erred in law or otherwise acted unreasonably in finding that Messrs Semenoff and Mr Turner were not fit and proper persons.

[31] Mr Wicks QC responds that:

(a) Section 30C expressly envisages consideration of "any other matter" the Agency considers "appropriate" or "relevant" and there is nothing in the statutory language or framework which requires the assessment of fitness to be limited to personal non-compliance.

(b) This construction of s 30C is consistent with the public safety purpose of the LTA.

(c) Messrs Semenoff and Mr Turner were indisputably in control of SSL throughout the audit period.

(d) While the reference to s 30C(2)(b) in the decision which refers to offending by the Persons in Control was wrong, there was clear evidence of ongoing failure by SSL throughout the audit period to comply with road regulations. This provided an ample basis for the finding that the persons in control of SSL are not fit and proper persons to hold a TSL.

(e) Accordingly, there was no arguable error of law or evaluation.

Evaluation

[32] I agree with Mr Wicks that the purpose and scheme of the LTA envisage a broad inquiry at s 30S (supplemented by s 30C) into the fitness of Persons in Control of transport services. This inquiry is not limited to personal acts of non-compliance or offending. Section 30C(2)(f) and (4) make it clear that other factors may be relevant to the assessment of fitness. I also agree that what might be called systemic failure over a lengthy period to comply with road regulations, including the Rules could be a ground for finding that a person in control of the transport service is not a fit and or proper person to control that service. I am also satisfied, for the purposes of judicial review, that there is sufficient evidence of systemic failure given the nature, scale and duration of the non-compliances – see the findings of the NZTA noted at [6] and [11] above. While Mr Turner for SSL disputes the accuracy of some of the findings made by Ms Despard, on the evidence available to me, NZTA's concern at the performance of SSL in the years 2016 and 2017 is justified. Mr Neutze claims to the contrary appear, at least to me, to be unarguable in judicial review context.

[33] But in this case, the requirement at s 30S to be "satisfied" that the person in control is not a fit and proper person to have control of a transportation service is an exacting one that must be directed to the person subject to the inquiry. It is at least reasonably arguable that the decision maker must identify cogent material that shows a clear nexus between the systemic failure and the specific actions or inactions of the person under inquiry. Generalisations about SSL's performance and simplistic attributions to Messrs Semenoff and Mr Turner are arguably insufficient to discharge the obligation to be satisfied.

[34] This requirement for proof accords with the scheme of the Act and specifically the provisions dealing with the chain of responsibility. As noted above s 79T requires proof that the impugned person, by act or omission, directly or indirectly caused or required a driver to fail to comply with the rest time requirements prescribed in the Act or the Rules. Given the consequences of a finding of unfitness, it is at least

arguable that the decision maker must have at least some proof of acts or omissions of the kind needed to establish a chain of responsibility offence under s 79T.

[35] I am fortified in this view because evidence of systemic failure over a long term might justify an alternative finding under s 30S(1), namely that the holder of the licence – SSL – is not a fit and proper person. This would address and provide a more direct remedy for NZTA's legitimate concerns about road safety.

[36] I also agree with Mr Neutze that it is further arguable the decision lacks the requisite attribution to specific individuals. Key findings within the August 2018 notice of proposal and in the March 2019 decision letter are expressed in terms of the performance of SSL as a whole. There are also findings that might fairly be said to expressed in generalised and inconclusive terms, for example the March 2019 decision observes that "speeding by SSL's drivers *appears* to be tolerated". This apparent generalisation is carried into Ms Despard's affidavit when she states:

> Specifically, the basis for my determination in this case that the Persons in Control were not fit and proper persons to hold a TSL was that I considered that the Persons in Control were *either unwilling or unable* to ensure that the applicant's drivers complied with the relevant road safety requirements and thus there was a risk to land transport safety …. Having considered the applicants submissions … I considered there was still *insufficient* evidence that the Persons in Control were taking steps and putting systems in place to ensure compliance …. I therefore concluded that the Persons in Control were not fit and proper persons, *individually or collectively*, to be in control of a transport service ….

[37] While ex post facto evidence of a decision maker about the decision carries little weight, this passage highlights the generalised and in part inconclusive nature of the findings she made. There is no specific attribution to any individual and there is no clear finding as to whether it is an act (a willingness) or omission (an inability) which is of concern. Rather, Ms Despard simply attributes a lack of fitness to all three because of SSL's poor record of performance. Whether this is sufficient or not will be a matter for the substantive review hearing, but it is arguable that generalised findings of this kind do not discharge the legal condition to be satisfied that each of the persons under scrutiny is not a fit and proper person to be in control of a transport service.

Should relief be granted – public safety?

[38] Protection of the public is a key consideration in determining whether interim orders should be continued. As Ms Despard noted in her affidavit:

> Driver fatigue can lead to negative mental and physical impacts on an individual driver. In New Zealand, for the years 2014 to 2016, driver fatigue was a factor in at least 12% of fatal crashes, and 6 percent of serious injury crashes.

[39] SSL seeks to dismiss these statistics because the majority of the recorded fatalities were not caused by transport service providers. But I think that tends to support rather than undermine NZTA's key position. Left uncontrolled, driver fatigue is a major issue of concern, including a heightened risk of fatalities. There is therefore some force to NZTA's submission that a precautionary approach is justified given SSL's poor compliance record. This is supported by the scheme of the LTA which does not provide for stay of decisions pending appeal. This is a strong direction that SSL the carries the burden of showing that it should continue to operate.

[40] Turning to the evidence, the various problems identified by the NZTA are set out above. There is affidavit evidence from Ms Eileen Kelly elaborating on the identified non-compliances in 2016 and 2017, including speeding and work time breaches. This evidence refers to ongoing non-compliances with the March interim order conditions. Concern is expressed about the inability of SSL to provide GPS reports showing the movement of trucks throughout the day. Mr Deane Palmer also reports on the outcomes of "Operation Northern", a short compliance programme conducted over 17 and 18 April 2019. He says of 31 vehicles stopped, 23 belonged to SSL. Of these vehicles, 26 defects were found, 13 of which qualified for "pink stickers" which mean the vehicle is deemed unsafe for the road. 7 of the defects qualified for a dark green sticker, so that they were immediately removed from the road.

[41] Mr Turner however disputes several of the assumptions made by NZTA which underpin the Revocation decision and the observations made by Ms Kelly and Mr Palmer. He noted:

(a) SSL does not agree that taking rest breaks during non-productive periods at source locations is unlawful;

(b) The NZTA has been unable to identify adequate safe areas for drivers to take rest breaks at other locations, particularly in the Northland;

(c) SSL does not accept that its drivers do not take adequate breaks or that the company does not enforce the taking of breaks;

(d) SSL disagrees with the GPS reports relied upon by the NZTA in its assessment of compliance with speed limits and notes that 95% of the fleet were fitted with equipment that does not allow them to accelerate beyond 90kms per hour;

(e) A reliable GPS system installed across the entire fleet would cost around $151,800 per annum over three years. This investment cannot be made while the threat of revocation remains.

(f) SSL also disagrees with the GPS reports insofar as they are relied upon to establish breach of the requirement to take breaks and all company drivers are required to take breaks. This is said to be supported by SSL's records of individual drivers. (I note that reliance is placed on rest times being taken during loading and unloading – a point of contention).

[42] Mr Turner also notes that since the 22 March conditions imposed by the Court, any non-compliance has been inadvertent. He acknowledges there were three relatively minor instances of non-compliance detected at Police roadside inspections and SSL did not report them. He says SSL thought it was required to notify failures or defects that affected driver or third-party safety. He also refers to, in summary, the targeting of SSL trucks by the NZTA, noting for example that SSL trucks have received more pink stickers over a two-day period than it received over the previous two-year period. He then provides an explanation for each pink sticker.

Assessment

[43] As noted, I am satisfied NZTA's concerns are justified. The number and duration of the non-compliances suggests a systemic problem. The explanations for the non-compliances reveal a level of defiance about what is or is not necessary. When dealing with the everyday safety of road users, such defiance is reason for vigilance. Balanced against this, I am advised that Messrs Semenoff and Turner have 90 plus years of experience between them, with no record of any fatal incidents involving trucks under their control. I have also reviewed, albeit briefly, the nature of the audited non-compliances, including large numbers of truck maintenance infringements, speeding violations and work time breaches. Individually, the transgressions might be considered relatively minor, attracting minor fines for example. Their true significance is that cumulatively they suggest, as Ms Despard surmised, a lack of control or what I have already described as systemic failure. This bears on the immediacy of the need for protection of the public. The more recent outcomes of "Operation Northern" are a further reason for concern. I am not in a sensible position to resolve disputes about the pink stickers. But SSL is under no illusion, as Mr Turner has noted, SSL operations are now under constant scrutiny.

[44] I am therefore satisfied that the interim order is appropriate pending the determination of the substantive review proceeding or the appeal on the proviso that effective conditions can be either agreed or imposed to secure the protection of the public. I wish to signal to the parties that one of the key problems in this case is transparency and enforceability. Mr Turner has referred to the cost of an effective GPS system. While that may be so, a condition of this kind is attractive to me, particularly if the period to resolution could be an extended one.

The video

[45] During the hearing a video of a secret recording of exchanges involving Stan Semenoff and a former employee was played to me. One interpretation of the recording is that Mr Semenoff was encouraging his employee to conform to company policy about rest breaks and work logs irrespective of whether they strictly complied with transport regulation. Another interpretation is that he was simply telling the employee to comply with company policy about these things because that was

accepted industry practice. I am not in position to rule on this and in any event, I have not found the evidence helpful in resolving the issues before me. Whatever the position when this recording was taken, Mr Semenoff will be in no doubt about the expectations of the NZTA or this Court, whether he agrees with them or not.

[46] The publication of the video is however sought by various media organisations. This raises two separate issues – the reporting of the evidence and the release of the video for publication purposes. The former issue brings into play the presumption in favour of open justice affirmed by the Supreme Court in *Erceg v Erceg*, which said:[13]

> [2] "Open justice" imposes a certain self-discipline on all who are engaged in the adjudicatory process – parties, witnesses, counsel, Court officers and Judges. The principle means not only that judicial proceedings should be held in open court, accessible by the public, but also that media representatives should be free to provide fair and accurate reports of what occurs in court. Given the reality that few members of the public will be able to attend particular hearings, the media carry an important responsibility in this respect. The courts have confirmed these propositions on many occasions, often in stirring language.

[47] SSL seeks to rebut this presumption by reference to privacy considerations, citing various decisions of the Privacy Commissioner and referring to the observations made by the Court of Appeal in Talbot. I consider the following observation to be the most apposite:[14]

> In some circumstances the surreptitious recording of conversations may undermine the confidence and trust that is at the heart of good continuing working relations between employer and employee and their representatives and breach acceptable standards in employment relations.

[48] I am prepared to assume for present purposes, this is one of those cases where the recording is of a type that seriously undermines trust and confidence between employee and employer. The recording is also inherently unfair to Mr Semenoff because had he known he was being recorded he may have explained more carefully what he was trying to convey to his employee. It is evident to me in this regard that Mr Semenoff is trying to explain his company's approach in simple unvarnished terms to an employee whose first language is not English. Taken out of context, more meaning or significance might be given to what was said than what was intended at

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13 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310.
14 *Talbot v Air NZ* [1996] 1 NZLR 414 at 418.

the time. Balanced against this, there is strong public interest in the matters discussed between them and the approach taken by Mr Semenoff to his transport service.

[49] Overall, the balance between privacy interests and open justice favours the reporting on the evidence played in Court. The reporting must however be fair to Mr Semenoff. His evidence responding to what was shown in the video must also be reported on in equal measure. Furthermore, Mr Semenoff challenges the findings made by the NZTA and the outcome of that challenge may bear directly on the significance of the recording in terms of reputational impact. This leads to consideration of the second issue.

[50] The second issue brings into play Rules 12 and 13 of the Senior Courts (Access to Court Documents) Rules 2017. Rule 12 sets out the matters to be considered when access to documents held by the Court is sought. It states:

> **12 Matters to be considered**
>
> In determining a request for access under rule 11, the Judge must consider the nature of, and the reasons given for, the request and take into account each of the following matters that is relevant to the request or any objection to the request:
>
> (a) the orderly and fair administration of justice:
>
> (b) the right of a defendant in a criminal proceeding to a fair trial:
>
> (c) the right to bring and defend civil proceedings without the disclosure of any more information that the private lives of individuals, or matters that are commercially sensitive, than is necessary to satisfy the principle of open justice:
>
> (d) the protection of other confidentiality and privacy interests (including those of children and other vulnerable members of the community) and any privilege held by, or available to, any person:
>
> (e) the principle of open justice (including the encouragement of fair and accurate reporting of, and comment on, court hearings and decisions):
>
> (f) the freedom to seek, receive, and impart information:
>
> (g) whether a document to which the request relates is subject to any restriction under rule 7:

(h) any other matter that the Judge thinks appropriate.

[51] Rule 13 provides for a graduated approach depending on what stage has been reached in the proceeding. It states:

> **13 Approach to balancing matters considered:**
>
> In applying rule 12, the Judge must have regard to the following:
>
> (a) before the substantive hearing, the protection of confidentiality and privacy interests and the orderly and fair administration of justice may require that access to documents be limited:
>
> (b) during the substantive hearing, open justice has –
>
> (i) greater weight than at other stages of the proceeding; and
>
> (ii) greater weight in relation to documents relied on in the hearing than other documents:
>
> (c) after the substantive hearing, -
>
> (i) open justice has greater weight in relation to documents that have been relied on in a determination than other documents; but
>
> (ii) the protection of confidentiality and privacy interests has greater weight than would be the case during the substantive hearing.

[52] An interlocutory application is defined:

> **Interlocutory application**
>
> (a) means any application that is made to the court in a civil or criminal proceeding, an intended civil or criminal proceeding, or an appeal or intended appeal in respect of a civil or criminal proceeding, -
>
> (i) for an order or a direction relating to a matter of procedure; or
>
> (ii) in the case of a civil proceeding, for some relief ancillary to that claimed in a pleading; and
>
> (b) includes an application to review any order made, or a direction given, on an application to which paragraph (a) applies.

[53] A substantive hearing is then defined as follows:

> **Substantive hearing** means, -
>
> (a) in relation to a civil proceeding,-
>
> (i) a hearing (other than the hearing of an interlocutory application) at which issues that will decide the ultimate outcome of the proceeding are determined; and
>
> (ii) from the start of that hearing until the court finishes delivering its judgment in the proceeding (unless the proceeding is earlier discontinued, in which case until the discontinuance);

[54] The submissions of the parties did not appear to appreciate the graduated approach to release of Court documents. This is an interlocutory proceeding for ancillary relief. The evident statutory policy at rule 13(a) is that protection of privacy interests and the orderly and fair administration of justice may require that access to documents be limited, departing from the usual presumption.

[55] I have come to the view nevertheless that the requirement for open reporting should prevail. While there is substance to Mr Semenoff's claim that the publication of the video is unfair to him because it breaches his right to privacy and presents an incomplete picture of his relationship with the employee and his overall management of SSL, there is a strong public interest in open reporting of this application for interim relief. The public is entitled to full transparency on a matter that concerns their safety, and more so because SSL has been largely successful in this application. The public should not be deprived, without very good reason, of an explanation of the evidence afforded by media coverage.

[56] In this regard, it is necessary to repeat the direction above – the reporting must be balanced and fair. Mr Semenoff does not accept the allegations levelled at him and/or the rather limited perspective of him afforded by the secret recording. His success in the application for interim relief is also premised on the Court's confidence that, subject to conditions to be finalised, SSL operations under his control do not present an undue risk to the public.

Outcome

[57] The interim order preserving SSL's position will be continued, subject to finalisation of conditions. In this regard I direct the parties to endeavour to agree conditions and if that is not possible, file submissions within 3 working days. The interim relief as granted by Woolford J will apply pending my final decision.

[58] The video and the transcript of the video shall be made available to the media organisations present at the hearing. Mr Semenoff's affidavit, together with the submissions of counsel, should also be given to them. It is my expectation that these media organisations will ensure that the coverage of this evidence is balanced and fair to Mr Semenoff.

Costs

[59] Submissions on costs, if necessary, are to be filed within 5 working days. Submissions over three pages in length will not be accepted for filing.